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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DONALD MILTON ORAND and
MARGARET E. ORAND and
HALLELUJAH HARVEST, INC.,
Petitioners,

v.

JAMES R. ADAMS and
SAN JACINTO RIVER AUTHORITY and
UNNAMED OFFICERS and AGENTS,
Respondents.

On Petition For Writ of Certiorari
To The Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

Do Dam Operators Have A Constitutional Duty To Warn Below Dam Citizens And Other Foreseeable Victims, Of Foreseeable Harm, Prior To Their Release Of Flood Water Upon Unsuspecting Below Dam Citizens, Pursuant To The Fifth And Fourteenth Amendments, But Not Limited To?

Must Property Owners That Have Been Damaged By State Officers, Agents and Agencies Acting "Under Color of State Law", Exhaust State Of Texas Court Remedies, Before Bringing A Title 42 U.S.C.A. 1983, Title 28 U.S.C.A. 1331, 1343 Action In Federal Court?

Where State of Texas Officials Are Immune From Liability Under Texas Tort, Did The District Court Violate The Fifth, Seventh and Fourteenth Amendment, When It Granted A Motion To Dismiss A Title 42 U.S.C.A. 1983, Title 28 U.S.C.A. 1331, 1343 Complaint, Based Upon Alleged Similar Claims Pending Against Said State of Texas Officials Employer, In A State Tort Proceeding?

Where A Statute Of Limitations Has Run, Did The District Court Apply The Proper Standard Of Review Of A Pro Se Citizen Complaint, When It Granted A Defendants Motion To Dismiss, Based On The Courts Lack Of Subject Matter Jurisdiction?

When A District Court Has Granted A Motion To Dismiss A Pro Se Civil Rights Complaint, Where There Are Damages In Controversy And Factual Issues At Dispute, Based Solely On A Motion To Dismiss, Did The Appellate Court Depart So Far From The Accepted And Usual Course Of Judicial Proceedings, And Thus Sanction Such A Departure By The District Court, To Call For An Exercise Of

This Courts Supervisory Power, When It Granted A Motion To Dismiss The Appellate Process Without Review Of The Record On Appeal Or Briefs On File?

Where Taking Is An Issue, Must A Higher Standard Than Reoccurrence Be Employed, Where Lives, Homes and Personal Property Have Been Destroyed By State Officers, Agents and Agencies In Control And Manipulation Of Flood Water, When Determining Fifth and Fourteenth Amendment Violation?

Did The District Court And Appellate Court Violate The Most Basic Concept Of Jurisprudence When They Denied Petitioners The Opportunity To Prove A Taking Claim By Disallowing Either An Evidenciary Hearing Or Jury Trial And Refusing To Review The Record In A Light Most Favorable To Finding A Cognizable Claim?

LIST OF PARTIES

Petitioners Donald Milton Orand, Margaret E. Orand and Hallelujah Harvest, Inc, were Plaintiffs/Appellants in the courts below. Respondents James R. Adams, certain Unnamed Officers and Agents and the San Jacinto River Authority were Defendants/Appellees in the courts below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i, ii

PARTIES BELOW iii

TABLE OF CONTENTS ..... iv, v

TABLE OF AUTHORITIES ..... vi, vii, viii

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2-5

STATEMENT OF THE CASE 5-11

REASONS FOR GRANTING THE WRIT 11-21

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT 11-12

II. THE LOWER COURTS DECISIONS CONFLICT WITH THIS COURTS PRIOR PRONOUNCEMENTS 12-16

III. THE DECISION BELOW SO DE-VIATED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING THAT THIS COURTS SUPERVISORY POWER IS MANDATED..... 16

IV. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE PRIOR DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AS WELL THE FIFTH CIRCUITS LOCAL RULES 16-19

V. THE DECISION BELOW DEALS WITH NATIONALLY IMPORTANT AND RECURRING ISSUES WHICH HAVE VIOLATED THE FEDERAL CIRCUIT AND THIS COURTS PRIOR PRONOUNCEMENTS 19-21

CONCLUSION 21-22

APPENDIX 1a-9a

TABLE OF AUTHORITIES

Cases — Page

BEACON THEATRES v WESTOVER,
359 U.S. 500, 501 (1959) 20-21

BOAZMAN v ECONOMICS LABORATORY, INC,
527 F2d, 210 17-18

COLORADO RIVER WATER CONSERVATION DISTRICT v U.S., 424 U.S. 800 13

DUCEY v U.S.,
830 F2d, 1071 (9th Cir.) 11

DIMICK v SCHIEDT,
293 U.S. 474. 486 (1935) 20

FEDERAL DEPOSIT INSURANCE CORPORATION v ERNST & YOUNG, 967 F2d 166, 169 18

FLASKA v LITTLE RIVER MARINE CONST. CO.
389 F2d 885, 887; cert. denied
392 U.S. 928, 88 S.Ct. 2287,
20 L.Ed. 2d 1387 ..... 18, 21

HARTWIG v U.S.
202 Ct. Cl. 801,
485 F2d 615, 620 ..... 20, 21

LAKE COUNTRY ESTATES, INC. v TAHOE REGIONAL PLANNING AGENCY,
440 U.S. 391,
99 S. Ct. 1171 (1979) 14, 16

NEEDHAM v WHITE,
487 F2d, 355..... 13

PARRATT v TAYLOR,
451 U.S. 527..... 15

PATSY v FLORIDA BOARD OF REGENTS,
457 U.S. 496 (1982)..... 13

POND v BRANIFF AIRWAYS, INC.,
453 F2d 347..... 18

TEAMSTERS v TERRY,
494 U.S. 558 (1990)..... 23

TURNER v U.S.,
901 F2d 1093..... 20, 21

U.S. v DICKINSON,
331 U.S. 745, 748; 67 S.Ct. 1382;
91 Ld. Ed. 1789.... 20

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION v HAMILTON BANK,
473 U.S. 172, 184..... 9, 13, 15, 17

Constitution of the United States

FIFTH AMENDMENT..... 2, 3, 14, 16, 19, 20
SEVENTH AMENDMENT..... 2, 3, 16, 20
FOURTEENTH AMENDMENT 2, 3, 14, 15, 19, 20

Statutes and Rules

TITLE 28 U.S.C. §§1331..... 2-4, 8, 9, 16
TITLE 28 U.S.C. §§1343..... 2-4, 8, 14, 16
TITLE 42 U.S.C. §§1983.....2-4, 8-9, 13-17

TEXAS TORT CLAIMS ACT, TITLE 5,
101 at 101.026 Individuals Immunity Preserved..... 3, 4, 9, 10, 14, 15

TEXAS REV. STAT. ANN. TITLE 128,
CH. 12, ART. 8280-121,
SAN JACINTO RIVER AUTHORITY
Article 8280-121, para. O..... 4-6
Article 8280-121, para. F..... 5-6, 19

LOCAL RULE 27, INTERNAL OPERATING PROCEDURE, FIFTH CIRCUIT..... 3, 5, 19

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v.
JAMES R. ADAMS, SAN JACINTO
RIVER AUTHORITY and UNNAMED
OFFICERS AND AGENTS,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR A WRIT OF CERTIORARI

Donald Milton Orand, Margaret E. Orand and Hallelujah Harvest, Inc. hereby petition for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit, filed on September 9, 1997, (rehearing denied October 8, 1997), denying Plaintiffs/Appellants direct appeal of a civil rights complaint filed in the United States District Court, Southern District of

Texas, pursuant to Title 28 U.S.C. S_S 1331, 1343 and Title 42 U.S.C. S_S 1983 on behalf of themselves, (mandate stayed to and including December 31, 1997).

OPINIONS BELOW

The Court of Appeals Opinion dated September 9, 1997 in No. 97-20162, is unreported and is reproduced at page 1a of the Appendix to this certiorari petition (hereinafter "Pet. App."). An "Order" of Henry A. Politz, Chief Judge for the Fifth Circuit, dated September 25, 1997 dismissing a Judicial Misconduct Complaint is reproduced in Pet. App. 2a - 5a. The unreported denial of the Petition For Rehearing En Banc dated October 8, 1997 is reproduced, Pet. App. 6-7a. The unreported District Court Hearing Minutes and Order dated January 30, 1997 granting Defendants Motion To Dismiss and closing the case is reproduced at Pet. App. 8-9a.

JURISDICTIONAL STATEMENT

The Court of Appeals Opinion was entered September 9, 1997 (Pet. App. 1a). The Petition For Rehearing and Suggestion For Rehearing En Banc Opinion was filed October 8, 1997 (Pet. App. 6-7a). This Courts jurisdiction is invoked pursuant to 28 U.S.C. S_S 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Seventh and Fourteenth Amendments to the United States Constitution, but not

limited to and Title 28 United States Code Sections 1331 and 1343 as well Title 42 United States Code Section 1983. In addition, Title 5 Section 101 at 101.026 of the Texas Tort Claims Act maintains significance to this case, as well as Local Rule 27, Internal Operating Procedure for the Fifth Circuit.

The Fifth Amendment provides:

> "nor shall any person...be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation".

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Fourteenth Amendment provides in pertinent part:

> "nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 United States Code Section 1331 states:

> "the district courts shall have original jurisdiction of all civil actions where-in the matter in controversy exceeds the sum or value of $10,000, exclusive of

interest and costs and arises under the Constitution, Laws or Treaties of the United States..."

Title 28 United States Code Section 1343 states in pertinent part:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Title 42 United States Code Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 5 Texas Tort Claims Act Section 101.026 states:

"Individuals Immunity Preserved to the extent an employee had individual immunity from a tort claim for damages, it is not affected by this chapter."

Article 8280-121 San Jacinto River Authority states in pertinent part at paragraph O, Section 5:

> "The area of said District is hereby established to comprise all the territory within the watershed of the San Jacinto river and its tributary streams, save and except that portion of said watershed lying and being situated within the boundaries of Harris County, which is hereby expressly excluded from the boundaries of said district."

and 8280-121 paragraph F:

> "This Legislature finds and declares that the recurrent devastating floods in the valley of the San Jacinto River, which have, over a long period of years caused a deplorable loss of life and property..is hereby authorized to do any and all things necessary or suitable for the prevention of such public calamity."

Local Rule 27 Internal Operating Procedure for the Fifth Circuit states:

> "The clerk Assembles A Complete Set Of The Motions Papers, Including The Record And any briefs on file and submits them with a routing form to the initiating judge...For those Motions requiring panel action, a single set of papers is still prepared, but the initiating judge transmits the files to the next judge with his recommendation, the second judge in turn sends it on to the third judge. The latter judge returns the file and an appropriate order to the clerk."

STATEMENT OF THE CASE

The Respondents James R. Adams and certain Unnamed Officers and Agents are employed by Respondent

San Jacinto River Authority, a political subdivision of the State of Texas.

The San Jacinto River Authority was created by the Texas legislature in an attempt by said legislature to eliminate the "recurrent devastating floods in the valley of the San Jacinto River, which have over a long period of years, caused a deplorable loss of life and property" (see Art. 8280-121, F). The "area of" the San Jacinto River Authorities responsibility is established to comprise all the territory within the watershed of the San Jacinto River and **its tributary streams**, save and except that portion of said watershed lying and being situated within the boundaries of Harris County, Texas (see Art. 8280-121, O). Spring Creek, Montgomery County, Texas is an area of Respondents authority and responsibility.

Petitioners are property owners in Lot I, Block I, Spring Hills Subdivision where they own their principal residence and business. Petitioners property is located approximately 3/4 of a mile north of Spring Creek, a tributary of the San Jacinto River and a tributary of Respondents responsibility.

October 17 and 18, 1994, there was a flood event which was primarily man-made in nature, as a result of Respondents arbitrary and capricious action committed under color of State law. Petitioners claimed that the Respondents actions were a result of Respondent Adams and other Unnamed Officers and Agents, acting personally and in their official capacity, under color of state law, causing destruction and damage as well loss of life when they issued orders and obeyed orders opening the flood release gates of the Lake Conroe Dam releasing a unprecedented amount of water into

the San Jacinto River, **with no concern for the Citizenry below the dam.**

The actions of the Responents, without warning, caused the destruction of Petitioners home and contents as well Petitioners vehicles and other real and personal property, much of which could have been spared with warning. Respondents actions further caused Petitioners to become homeless for a period of time and to suffer in their health, all of which would not have transpired in absence of the Lake Conroe Dam and the manner it was operated by the Respondents.

Had Petitioners received a warning of the impending release of the 43 hour wall of rampaging flood water, they would have been able to remove the majority of their mobile equipment and much of their personal property, as well their own lives from harms way.

Seven other Citizens lost their lives as a direct result of the release of dam water without warning. Over Seven Hundred households were directly affected by the action of the Respondents, which would not have otherwise been affected by the rain event. Entire below dam communities were devastated and remain so as a result of Respondents actions.

Further, Petitioners live in constant fear of reoccurence, as the Respondents continue to refuse any flood control responsibility or responsibilty of **warning before release** of contained flood waters upon unsuspecting Citizens below the dam.

April 11, 1995 Petitioners filed a State of Texas Tort Claim against Respondent San Jacinto River Authority seeking damages.

October 15, 1996, one day before the exhaustion of the statute of limitations, Petitioners filed their Original Federal Complaint, in the United States District Court Southern District of Texas, presenting Federal Questions, pursuant to Title 28 U.S.C. s_s 1331, 1343 and Title 42 U.S.C. s_s 1983, requesting Jury Trial. The Federal Complaint named James R. Adams, Unnamed Officers and Agents of the San Jacinto River Authority, as well the San Jacinto River Authority itself and sought damages in excess of $10,000 for violations of certain named and unnamed U.S. Constitutional violations committed.

November 15, 1996 Respondents submitted a Motion To Dismiss, primarily based upon the fact of a pending Texas Tort Claim against Respondent San Jacinto River Authority, stating the case was not ripe for Federal review.

Petitioners properly objected to the Motion To Dismiss and on January 24, 1997 filed a Motion for Temporary Restraining Order and/or Preliminary Injunction.

The District court ordered a Hearing for January 27, 1997 on the Motion for Temporary Restraining Order stating no evidence to be taken. No notice was given that the Motion To Dismiss was also to be dealt with.

January 27, 1997 the District Court denied the Motion For Temporary Restraining Order (Pet. App. 8-9a) and abstained from further hearing the case noting, "most" (Reporters Transcript 41, hereinafter "RT") of the causes of action the Petitioners alleged would be resolved by state law

and that causes of action against the individual defendants could be asserted in state court, thus dismissing and closing the case.

An appeal was taken from this District Court action being docketed June 2, 1997 in the Fifth Circuit.

June 23, 1997 Respondents filed a Motion To Dismiss the Appeal for a lack of subject matter jurisdiction stating a "claim may not be brought in federal court until party has exhausted all available state court remedies", citing **Williamson Co. Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 196-97.** Respondents stated Petitioners claims were "unripe and that this case must therefore be dismissed".

Petitioner timely reponded to said Motion To Dismiss the appeal, refuting factual untruths presented by the Respondents and informing the appellate court that, "the cause at bar is not simply a takings claim. This clause is a Civil Rights violation claim". Petitioner informed the appellate court further that "there is a two year statute of limitations on a Civil Rights violations claim" and State of Texas officers and agents can not be held liable for acts committed personally, as well as in their official capacity, acting "under color of state law, in a Texas Tort Claim (Texas Tort Claim ACt 5, $^{S}_{S}$ 101.0215) but may only be sued as 'persons' under Title 42 U.S.C.A. 1983 in Federal Court. Petitioners summed up their objection to the Motion To Dismiss with a question to the Fifth Circuit,

> "May A Citizen File A Tort Claim Against A State Agency In State Court And A Concurrent Civil Rights Violations Suit Against That Agencies Officers And Agents Pursuant To Title 42 U.S.C.A. 1983, Title 28

U.S.C.A. 1331 For Actions Those Officers and Agents Personally As Well In Their Official Capacity Committed Under Color Of State Law?"

Appellate Briefing Schedule was prepared and submitted where on August 1, 1997 a correct Appellants Brief and Record Excerpts were filed.

August 28, 1997 Appellees corrected Brief was filed.

August 27, 1997 Mr. Milby, Clerk, U. S. District Court, Southern District of Texas transmitted the Record On Appeal to the Fifth Circuit.

September 8, 1997 Appellants Reply Brief was filed.

September 9, 1997 a Motions Panel consisting of Judge Edith H. Jones, Carl E. Stuart and James L. Dennis ordered the "motion of the Appellees to dismiss the appeal Granted" (Pet. App. 1a), said order being issued without the Motions Panel having either seen the Record On Appeal nor the Briefs filed.

September 12, 1997 Petitioners filed a letter of Judicial Complaint to Chief Circuit Judge Henry A. Politz based upon Motions Panels failure to Review Record on Appeal or Briefs prior to dismissing appeal. Chief Judge Politz denied the Complaint stating "the Orands (pro Se Plaintiffs/Appellants) were obligated to assist the court by making their motion papers self sufficient" (Pet App. 4a). Further the Chief Circuit Judge defined the Record On Appeal and Briefs on file to be **"unnecessary materials"** in determining a Motion To Dismiss an "appeal for lack of subject matter jurisdiction" (Pet. App. 4a).

It is on the basis of the District Courts order of Respondents/Defendants Motion To Dismiss and the Fifth Circuit Court of Appeals Order of Respondents/Appellees Motion To dismiss, that Petitioners now seek review.

REASONS FOR GRANTING WRIT

I.
THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT

The Writ of Certiorari should be granted because the decision of the Fifth Circuit has left every Citizen living below a dam facility at the mercy of a dam operator, no matter how qualified. The decision of the Fifth Circuit is in direct conflict with the Ninth Circuit on the issue of warning of foreseeable danger.

In **DUCEY v. U.S. 830 F2d, 1071**, the Ninth Circuit ruled,

> "A defendant has a duty to warn foreseeable victims of foreseeable harm...greater risks require a greater exercise of care" at **1172**. See also **NEEDHAM v. WHITE, 487 F2d 355**.

The **DUCEY** Court continued,

> "When an extraordinary force of nature merely accelerates harm to another which would otherwise have resulted from the actors negligent conduct, the actor is still liable for the harm" (Act of God defense

not available if effect could be avoided by exercise of reasonable care). **DUCEY** supra at **1073**.

This Honorable Court has an opportunity to place its finger in the Constitutional crack of the merciless position the Defendants have taken, who believe they have no responsibilty or foreseeable duty to warn below dam citizens of their impending life threatening conduct, when they open their flood release gates and release damaging, destructive, life threatening, life taking waters.

Athough an unreported opinion, the appellate court supports the District Court's position, when the District Court announced in its order of denial of relief:

> "the Court has no money to pay for, and it would be a violation of law for me to intrude in the operation of the San Jacinto Dam Authority's decision making process." (RT 34)

Because the orders and opinions were unreported, if this court refuses to grant the Writ, possibly every below dam citizen in our Circuit or the Nation, will not be affected, at this point. Every below dam citizen, in this Southern District of Texas, however, will be/is adversely affected and lives in constant unknown threat of unqualified, unresponsible State of Texas officials that operate dams, with no care or responsibilty regarding the impact of their actions.

If this Honorable Supreme Court denies this Writ, said denial leaves an entire class of people, those that live, work and maintain their livelihood below a dam facility, condemned to the threat of death and destruction, at the descretion of mechanical engineers employed to operate gates, rather than hydrologists employed to handle flood control, that believe they have no responsibility to warn.

II.
THE LOWER COURTS DECISIONS CONFLICT WITH THIS COURTS PRIOR PRONOUNCEMENTS

On the issue of ripeness, with the necessity of Petitioners to have first "exhausted state court remedies", the Fifth Circuit in denying subject matter jurisdiction directly violated this Supreme Courts mandate in **WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al V. HAMILTON BANK OF JOHNSON CITY, 105 S.Ct., 3108, 473 U.S. 172, 87 L.Ed. 2d 126**. The State of Texas does not provide their State Courts as exhaustion avenues of final administrative action by State agencies. This **WILLIAMSON** Court clarified, "there is no requirement that a plaintiff exhaust administrative remedies before bringing a $^{S}_{S}$ 1983 action", citing **PATSY v. FLORIDA BOARD OF REGENTS, 457 U.S. 496**. Concerning the exhaustion of "state court remedies" the **WILLIAMSON** Court left no room for misinterpretation,

> "while it appears that the State provides procedures by which an aggreived property owner may seek declaratory judgement,,,respondent would not be required to resort to those procedures before bringing its $^{S}_{S}$ 1983 action, because those procedures clearly are remedial." **473 U.S.** AT **193**.

The Fifth Circuit in its dismissal, for want of subject matter jurisdiction, violated a long list of this courts previous decisions. In **COLORADO RIVER WATER CONSERVATION DISTRICT v. U.S. 424 U.S. 800** at **817** the **COLORADO** Court stated:

"the pending of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction..."

In **LAKE COUNTRY ESTATES, INC. v. TAHOE REGIONAL PLANNING AGENCY, 440 U.S. 391, 99 S.Ct. 1179 (1979)**, this Court ruled at **1176**,

"Section 1983 provides a remedy for individuals alleging deprivations of their constitutional rights by action taken 'under color of state law".

"Even if it were not well settled that $^{s}_{s}$ 1983 must be given a liberal construction these facts adequately characterize the actions... as 'under color of state law' within the meaning of that statute. Federal jurisdiction therefore rests on $^{s}_{s}$ 1343 and there is no need to address the question whether there is an implied remedy for violation of the Fifth or the Fourteenth Amendment".

The District Court questioned Petitioner asking:

"have you sought in the state court to add Mr. Adams or any of these employees as defendants?

Mr. Orand: Your Honor, I couldn't figure out how you can get the fox to watch the hen house." (RT 18)

The District Court then implied, to which the Fifth Circuit affirmed, that,

> "there is a pending state court proceeding in which matters in controversy between the parties may be fully litigated". (RT 41 & 42)

The District Court referring to a pending Texas Tort Claim against San Jacinto River Authority. Although the Texas Tort Claim Act Title 5, Section 101 at 101.026 grants "Individuals Immunity" the District Court stated, "the state court has jurisdiction over the individuals" (RT 42).

The Supreme Court in **PARRATT v. TAYLOR, 451 U.S. 527** set forth,

> "it is abundantly clear that one reason the legislature (TITLE 42 U.S.C. 1983) was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies" at **534**, **535**.

The **WILLIAMSON** Court determined the qualifying issue of Federal judicial review was,

> "whether the initial decision-maker has arrived at a definitive position on the issue that inflects an actual, concrete injury..." **WILLIAMSON** SUPRA AT **193**.

The Respondents reached that definitive position when they opened the dam gates, without warning, releasing rampaging flood waters on unsuspecting citizens, inflicting concrete injury of an irreparable nature, refusing to-date to accept responsibility for their Constitutional violative actions.

The State of Texas courts maintained no jurisdiction over Respondents James R. Adams and the Unknown Named Officers and Agents, for a claim against them, for their actions committed personally while "acting under color of state law". The Texas Tort Claims Act 5 Section 101 at 101.026 grants individual immunity and therefore the lower courts denied Petitioners due process of law in violation of the Fifth Amendment and a right to a trial by jury pursuant to the Seventh Amendment, when they dismissed all claims and appeals without so much as an evidenciary hearing.

III.
THE DECISION BELOW SO DEVIATED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING THAT THIS COURTS SUPERVISORY POWER IS MANDATED

Where Citizens, alleging they have been damaged by state officers, agents and agencies, appear before the District Courts In Propria Persona, must they have a right to a liberal construction of their Complaint when being considered on Motion To Dismiss? Where the District Court dismissed a Title 28 U.S.C.A. 1331, 1343 and Title 42 U.S.C.A. 1983 Complaint, on a Motion To Dismiss, without holding an evidenciary hearing, or affording a trial by jury and the appellate court granted a Motion To Dismiss without even seeing the Record On Appeal or Briefs on File, **did the lower courts so far depart from the accepted and usual course of judicial proceedings to call for the exercise of this courts supervisory power**?

Are the Record On Appeal and Briefs on File truly "unnecessary materials" (Pet. App. 4a) as determined by Chief Judge Politz?

IV.
THE DECISION OF THE COURT BELOW CONFLICTS WITH THE PRIOR DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AS WELL AS THE FIFTH CIRCUITS' LOCAL RULES

The original federal complaint was filed in the U.S.D.C. Southern District of Texas one (1) day prior to the exhaustion of statute limitations. The District court was aware that the statute of limitations had expired when it inquired:

> "THE COURT: Whats the statute of limitations, do you know, on Section 1983 cause of action?
>
> MR. WYNNE: Its the same as would apply in State court, which under the circumstances I would say is two years.
>
> THE COURT: So a taking or deprivation of some constitutional right from October 1994, what's your position on when the statute ran?
>
> MR. WYNNE: It ran in October of 1996." (RT 25)

In 1976 in a case before the Fifth Circuit entitled **BOAZMAN v. ECONOMICS LABORATORY, INC., 527 2d 210** then Chief Circuit Judge John R. Brown stated,

> "Ordinarily, we would apply a less stringent standard of review to a District Courts dismissal of a suit without prejudice, because the Plaintiff would be able

to file his suit again. Where however the statute of limitations prevents or arguably may prevent a party from refiling his case after it has been dismissed, WE FAIL TO SEE HOW A DISMISSAL WITHOUT PREJUDICE IS ANY LESS SEVERE A SANCTION THAN A DISMISSAL WITH PREJUDICE" at **213**.

Chief Judge Brown continued,

"where the dismissal is without prejudice, but the applicable statute of limitations probably bars further litigation, THE STANDARD OF REVIEW OF THE DISTRICTS COURTS DISMISSAL SHOULD BE THE SAME AS IS USED WHEN REVIEWING A DISMISSAL WITH PREJUDICE." at **213**. See also **POND v. BRANIFF AIRWAYS, INC., 5 Cir. 1972, 453 F2d 347**.

Unless this Supreme Court says, that a proper review of a district court dismissal with prejudice, is to allow the appellate courts grant motions to dismiss appeals, of dismissal with prejudice, without benefit of record on appeal nor briefs on file, this Honorable Court must grant this Writ in the interest of justice for every Citizen.

In **FLASKA v. LITTLE RIVER MARINE CONSTRUCTION CO., 5 Cir. 1968, 389 F2d 885, 887**, cert. denied **392 U.S. 928, 88 S.Ct. 2287, 20 l.Ed. 1387** it was recognized that an order of dismissal with prejudice is such a severe sanction that it is to be used only in extreme cases.

The Fifth Circuit in **FEDERAL DEPOSIT INSURANCE CORPORATION v. ERNST & YOUNG, 967 F2d 166** affirmed, "We REVIEW THE RECORD IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT" (at **169**), when considering Motions To Dismiss. In the instant case, Chief Judge Politz considered the Record on Appeal and Briefs on file to be "unnecessary materials" (Pet. App 4a). The Fifth Circuits own Internal Operating Procedure Local Rule 27 states, the "record and any briefs on file" should be submitted to the proper motions judges. Thus in this case, the lower court has violated not only this courts prior pronouncements but as well their own decisions and local rules. This Honorable Supreme Court must say yes and grant the Writ, for the protection of a most sacred right in America, the right to redress ones' grievances of state government intrusion in a federal court of law, and be heard.

V.
THE DECISION BELOW DEALS WITH NATONALLY IMPORTANT AND RECURRING ISSUES WHICH HAVE VIOLATED THE FEDERAL CIRCUIT AND THIS COURTS PRIOR PRONOUNCEMENTS

THERE HAS BEEN A FIFTH AND FOURTEENTH AMENDMENT TAKING BY FLOOD. The issue of "a lack of reoccurrence" and "one time flood event" are issues the Respondent/Defendants have claimed, Petitioners/Plaintiffs have refuted and the lower courts have refused to allow the determination of, through either evidenciary hearing, trial jury or review of Record on Appeal.

This Court will find that we as Citizens residing adjacent to a tributary of Respondents responsibilty, below

the Lake Conroe Dam, reside upon property and in areas that have suffered reoccurrent flooding and taking for over 54 years. This reoccurrent destruction is established in the Record On Appeal in Article 8280-121, Para. F, of the San Jacinto River Authority's empowerment legislation. Thus the Fifth and Fourteenth Amendments on the taking claim is an appropriate cause of action for the subject matter jurisdiction.

In **TURNER v. U.S. 901 F2d 1093** the U.S. Court of Appeals, Federal Circuit, pronounced:

> "The Supreme Court has stated the 'property is taken in the constitutional sense when inroads are made upon an owners use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time" at **1095** see also **U.S. v. DICKINSON, 331 U.S. 745, 748, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789**.

The Federal Circuit continued in **TURNER**:

> "to show a servitude has been imposed through a taking by flooding, a plaintiff **MUST PROVE** that the land is subject to permanent or inevitable recurring floods" at **1095,** see **HARTWIG v. U.S. 202 Ct. Cl. 801, 485 F2d 615, 620**.

In order for Plaintiffs to **PROVE** a factual issue they must be afforded an opportunity to **PROVE**, which is what the Fifth, Seventh and Fourteenth Amendments are about. THE PETITIONERS HAVE NEVER BEEN GIVEN AN OPPORTUNITY TO PROVE THEIR CASE which is why this Writ must issue.

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial shoud be scrutinized with the utmost care." **DIMICK v. SCHIEDT, 293 U.S. 474, 486 (1935)** (quoted in **BEACON THEATRES v. WESTOVER, 359 U.S. 500, 501 (1959)** and **TEAMSTERS v. TERRY, 494 U.S. 558, 565 (1990)**.

Petitioners would plead this Honorable Supreme Court establish a higher standard on the taking issue than found in **TURNER** and **HARTWIG**, both of which dealt with riparian farm land owners versus the instant case which deals with the destruction of homes, personal property and life.

CONCLUSION

If allowed to stand, not only the decision, as well the attitude of the lower courts, will certainly intensify the constitutional erosion over time, of such basic rights as have been set forth heretofore. Certain inalienable rights have been wilfully denied Petitioners by the lower courts, as the lower courts rely heavily on this Honorable Supreme Courts percentage of granting the revered Writ. The granting of the Writ in this case will place certain and specific protection upon every Citizen of these United States living below a dam, to be warned at a minimum, before a dam is opened, rather than wake up, as we, from a night of sleep, to be flooded in your very home, loosing in a moment, what you have worked a lifetime to build.

The granting of this Writ goes even deeper for it deals with the attitudes of lower courts toward those that are less

fortunate, those that have an inability to retain a legal defender and must turn to the courts in their own person. The lower courts with their erroneous unreported orders and opinions may violate any rule or rule of law and be responsible to no one, for their orders are secret from their legal peers, unpublished in the Federal Record and Reporter, relying upon a 99% chance that this Honorable Court will not grant review. If this type attitude is allowed to stand, today it is a group of Citizens residing in the vicinity of a single river and tributary, that remain affected. Next year, it could be an issue of Constitutional deprivation, that would involve the entire Nation, especially in light of the growing effects of "El Nino".

For those that resided in Germany in the beginning of this century, it was first the burning of books by the minority that wished to oppress a free majority, then it was the burning of bodies. It is that without virtue, which is done in secret, if allowed to stand, will flourish into maturity. This Honorable Supreme Court, in issuing the Writ, will shine a light upon the evil and suffering of hardship that has been endured by Petitioners, as a result of blatant disregard of the U.S. Constitution on the part of the lower courts and state agents and agencies, thus saying we will not allow this to happen in America. For the reasons set forth above, this petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Donald Milton Orand
In Propria Persona
1111 Spring Hills Drive
Spring, Tx 77386-2165
(281) 363-0388

Margaret E. Orand
In Propria Persona

Dated: 12/27/97

U.S. Court of Appeals
FILED
Sep 9 1997
Charles R. Fulbruge III, Clerk

* * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20162

DONALD MILTON ORAND; MARGARET E ORAND;
HALLELUJAH HARVEST INCORPORATED

Plaintiffs-Appellants

v.

JAMES R ADAMS; SAN JACINTO RIVER AUTHORITY
Defendants-Appellees

Appeal from the United States District Court for the Southern District
of Texas, Houston

Before JONES, STEWART, and DENNIS, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the motion of the appellees to dismiss the appeal is GRANTED

MOT-14

"s/ E. J."
"s/ J. D."
"s/ C. E. S."

U.S. Court of Appeals
FILED
Sep 30 1997
Charles R. Fulbruge, III, Clerk

* * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE:

The Complaint of Donald Orand and Margaret Orand Against United States Circuit Judges Edith H. Jones, Carl E. Stewart, and James L. Dennis, Fifth Circuit Court of Appeals Under the Judicial Conduct and Disability Act of 1980.

Docket Number: 97-05-372-0084

ORDER

Donald and Margaret Orand's complaint arises from a decision of this court dismissing their appeal for lack of subject matter jurisdiction. The case was dismissed by a panel of this court consisting of United States Circuit Judges Edith H. Jones, Carl E. Stewart, and James L. Dennis. The Orands assert that the panel failed to obtain the complete district court record before deciding the motion to dismiss.

The Orands also believe that the panel should have requested copies of the briefs, which were filed after the motion to dismiss was submitted for decision.

The Orands base their contentions on language in an internal operating procedure that reads as follows:

> The clerk assembles a complete set of the motion papers, including the record and any briefs on file and submits them with a routing form to the initiaing judge.

Internal Operating Procedure "Motions Panel," following Local Rule 27.

The Orands' appeal was part of a test program conducted by this court in effort to increase the efficiency with which appeals are considered. This test program requires that the record be kept in the District Court for use by counsel or the parties in preparing their briefs. The clerk of this court informed the parties by letter of this change in the usual practice. The Certificate of Readiness of Record on Appeal, issued by the District Court, also told the parties that the record was being kept in the District Court.

Despite these notifications, the parties included references to the record in their motion papers.

After the motion to dismiss was filed, the clerk of this court wrote the Orands stating that the motion would be submitted without oral argument, and that a response was required by a date well before the due date for the appellants opening brief. In addition, the internal operating procedure quoted above makes it clear that motions may be decided before briefing is completed.

Under these circumstances, it should have been obvious that the Orands were obligated to assist the court by making their motion papers self-sufficient. They had no basis on which to expect that their briefs, filed after submission of the motion, would be considered by the panel in deciding the motion.

The purpose of the internal operating procedure is to make available to the panel materials needed by the panel in making its decision. Any portions of the record needed by the panel in this case were available, both through the clerk's office and, by computer and telefax, directly from the District Court.

In fact, the only portion of the record cited by either party in connection with the motion to dismiss was the "Original Complaint" filed in the District Court. It appears that this document had been provided to this court as an attachment to an earlier motion filed by the Orands. The papers relating to this earlier motion were sent to the panel along with the motion to dismiss. The panel therefore had a copy of the document cited by the parties.

If this complaint is based on the expectation that judges are required to assemble masses of unnecessary materials before deciding a motion, it is without merit. To the extent that it takes issue with the panel's decisions about what materials needed to be considered in order to decide the motion, it is directly related to the decision on the merits, and, as such it, is subject to dismissal under 28 U.S.C. $\S\S$372 (c) (3) (A) (ii).

Judicial misconduct proceedings are not a substitute for or supplement to the normal process of appellate review, and they may not be used to obtain reversal of a decision or ruling. The complainants' requests for such relief must be denied.

An order dismissing the complaint is entered simultaneously herewith.

"s/ Henry A. Politz"

Henry A. Politz
Chief Judge

September 25, 1997

U.S. Court of Appeals
FILED
Oct 8 1997
Charles R. Fulbruge III, Clerk

* * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20162

DONALD MILTON ORAND; MARGARET E ORAND;
HALLELUJAH HARVEST INCORPORATED
Plaintiffs-Appellants

v.

JAMES R ADAMS; SAN JACINTO RIVER AUTHORITY
and unnamed officers and agents
Defendants-Appellees

Appeal from the United States District Court for the Southern District
of Texas, Houston

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion _____, 5 Cir., _____,
_____ F,3d _____)

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

"s/ Carl E. Stewart"
United States Circuit Judge

United States District Court
Southern District of Texas
ENTERED
Jan 30 1997
Michael N. Milby, Clerk of Court
* * * * *

HEARING MINUTES AND ORDER

Cause Number: 96-3444

Style: Donald Milton Orand, et al, v. James R. Adams

Appearances:

Counsel:	**Representing:**
Donald Orand/Margaret Orand	Plaintif
Jonathan Day	Defendant

Date: January 27, 1997 **Ct. Reporter:** W. Faris

Time: 4:05 p.m. - 5:15 p.m.

At the hearing the Court made the following rulings:
Oral argument heard on Plaintiff's Motion for Temporary Restraining Order.

Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction [Doc. #9] is **DENIED** for reasons stated on the record in open Court.

Defendant's Motion to Dismiss [Doc. #7] is **GRANTED** FOR REASONS STATED ON THE RECORD IN OPEN COURT. **THIS CASE IS CLOSED.**

The Clerk will file these Minutes and Order and provide copies to the parties.

SIGNED at Houston, Texas this 27th day of January, 1997.

"s/ Nancy F. Atlas"
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

"s/ 11 "